DATE: AUGUST 23, 1995

CASE NO: 94-INA-304

In the Matter of

SABTEX (N.Y.) LTD., INC.
Employer

on behalf of

ZARIN J. IRANI
Alien

Before: Clarke, Jarvis and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Sabtex (N.Y.) Ltd., Inc.'s request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On December 8, 1992, the Employer filed a Form ETA 750 Application for Alien Labor

Certification with the New Jersey Department of Labor ("NJDOL") to enable the Alien, Zarin J.

Irani, to fill the position of "Bilingual Secretary." The Job Service, however, classified the position as "Secretary" (AF 35). The job duties were described as follows:

> Receive and place overseas calls in Hindi; operate fax; read and route incoming correspondence; prepare and handle routine correspondence with suppliers, especially from India; take shorthand; type correspondence; receive and handle invoices, credit memos, bills of lading and other import documentation; answer telephones (and give information to local callers); greet business visitors; schedule appointments.

(AF 35). The stated requirements for the position are: 2 years experience in the job offered or in the related occupation of Secretary in Import/Export. "Must be fluent in English/Hindi languages. Must type 60 wpm and take shorthand in English at 110 wpm." (AF 35).

The CO issued a Notice of Findings on September 9, 1993, proposing to deny certification on the grounds, inter alia, that the Employer failed to establish the business necessity for the Hindi language requirement (AF 51-55).

The Employer submitted its rebuttal on or about November 13, 1993 (AF 56-80). The CO found the rebuttal unpersuasive and issued a Final Determination on November 19, 1993, denying certification (AF 81-84).

On December 24, 1993, the Employer requested a review of the denial of certification (AF 85-152). Included among the documents submitted in its request for review is a letter, dated December 23, 1993, from Employer's Vice President, Barry Edelman, asking the CO to reconsider her Final Determination (AF 140-141). On February 17, 1994, the CO denied the reconsideration request before forwarding this matter to the Board of Alien Labor Certification Appeals for review (AF 153).

In response to this Board's Notice, dated April 14, 1994, the Employer filed a timely Motion to Remand and a "Legal Brief in Support of Appeal and Motion to Remand." The Employer's "Supplement to Brief," dated May 16, 1994, was received on May 24, 1994.[1]

Discussion

In the Notice of Findings, the CO directed the Employer to either delete the Hindi language requirement or document that it arises from business necessity, as provided in §656.21(b)(2)(i).
Specifically, the CO instructed the Employer to document the following:

> 1. The total number of clients/people he deals with and the percentage of those people he deals with who cannot communicate in English. Document how these suppliers/clients/people communicate in an international environment when HINDI is not spoken/understood.

[1] The time period for filing the appeal brief expired on May 10, 1994. Our consideration of the Supplement to Brief, however, has no bearing on the ultimate resolution of this matter, since this decision is not based on alleged procedural errors by the CO, but rather on the merits of the case.

2. The percentage of his business that is dependent upon the language. Document the basis for this percentage. Document the dollar volume of business generated by the HINDI language in 1992 and thus far in 1993.

3. How absence of the language would adversely impact business. Be specific.

4. The percentage of time worker would use the language. Relate language requirements to job duties.

5. Describe how employer has dealt with and handled HINDI speaking clients previously or is currently handling this segment of his business,. Document language abilities of other workers, their job titles and duties.

6. Describe services provided by employer to other ethnic groups and how the language problem is handled.

7. Any other **documentation** which will clearly show that fluency in HINDI is essential to employer's business. (emphasis in original).

(AF 51-52).

In pertinent part, the Employer's rebuttal consists primarily of a letter, dated October 27, 1993, by its Vice President, Barry Edelman, in which he seeks to address the request for documentation outlined above (AF 63-67).

Upon review, we find that the crux of this case lies in analyzing the percentage of business which allegedly relies on the Hindi language requirement, as well as the availability of alternative means of maintaining, or even expanding, such business.

In summary, the Employer represents that "approximately 30-35% of our suppliers are from India and their native language is Hindi. At least 25% of these suppliers cannot speak English...approximately 20% of our revenues depends on the Hindi language. Our 1992 annual gross sales were 60 million. Therefore the amount of gross sales dependent on the Hindi language was $12 million. Our gross sales for the year to date are $45 million. The amount of sales dependent upon the Hindi language is $9 million. This figure represents 20% of our gross sales." (AF 65). In addition, the Employer stated that its present practice of using Indian translators is inefficient and costly. Therefore, the Employer asserts that it needs a secretary who is fluent in both Hindi and English to keep its current business and further expand in this market (AF 64-65).

In her Final Determination, the CO found the Employer's rebuttal inadequate regarding this issue (AF 81-84). While we agree with the CO's ultimate finding, we note that the focus of her denial should have been weighted more on the absence of a showing of business necessity, rather than the lack of supporting documentation for the Employer's statements. As noted by the Employer, in its request for review and brief in support of its motion to remand, the CO did not specify the nature of the documentation to be supplied to answer the questions presented in the Notice of Findings. Under such circumstances we might ordinarily remand the case to the CO. We note, however, that in its request for reconsideration, the Employer stated, in pertinent part: "We are attaching a stack of business materials to and from India. As you will note, these are in

English. Your office keeps asking us for Hindi documentation. We do not have any. We do not have any because we always have to deal with Hindi only suppliers in English." (AF 140). Accordingly, remanding this case to the CO would be an idle act. Moreover, rather than support a

finding of business necessity, we find that the Employer's own statements indicate that the Hindi language is a mere preference.

In the present case, the Employer's Vice President's statement establishes that only 20% of its revenues depends on the Hindi language, and that as many as 75% of the Hindi-language suppliers also speak English. Accordingly, the percentage of revenue in which the Employer deals with a Hindi-only supplier is apparently as little as 5%. We find this insufficient to establish the business necessity for the Hindi language requirement. **See, e.g.**, Royal Prestige International, 93-INA-356 (Nov. 16, 1994); Best Roofing Co., Inc., 88-INA-125 (Dec. 28, 1988); Washington International Consulting Group, 87-INA-625 (June 3, 1988). This is especially true in the case at bench, where the Employer also has the alternative of continuing to use Hindi-language interpreters. Furthermore, the Employer has clearly failed to establish business necessity on the basis of its mere statement that it wants to expand further in this market, particularly under the strict scrutiny standard set forth in Advanced Digital Corporation, 90-INA-137 (May 21, 1991).

In summary, the Employer failed to establish the business necessity for the Hindi language requirement. Accordingly, certification was properly denied.

ORDER

The Final Determination of the Certifying Officer is affirmed and labor certification is denied.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

Judge Joel Williams dissents from the Decision in this case.